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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

GAF BROADCASTING COMPANY, INC.

For Renewal of the License
of FM Broadcasting Station WNCN
New York, New York

CLASS ENTERTAINMENT
AND COMMUNICATIONS, L.P.

THE FIDELIO GROUP, INC.

For a Construction Permit
for a New FM Station on
104.3 MHz at New York, New York

MM Docket No. 93-54

File No. BRH-910201WL

File No. BPH-910430ME

File No. BPH-910502MQ

To: Administrative Law Judge Joseph Chachkin

OPPOSITION TO MOTION TO ENLARGE ISSUES

GAF Broadcasting Company, Inc. ("GAF"), by its attorneys and pursuant to Section 1.229 of the FCC rules, hereby opposes the Motion To Enlarge Issues ("Motion") filed by the Listeners' Guild, Inc. (the "Guild") on April 19, 1993.¹ As detailed below.

1. The Guild's Standing.

The Guild claims to have filed its Motion pursuant to the requirements of Section 1.229 of the FCC rules. But that rule expressly authorizes only a "party to a hearing" to file a motion to enlarge hearing issues. 47 C.F.R. Section 1.229(a). No party to this comparative proceeding has done so. The Hearing Designation Order ("HDO")² did not name the Guild a party, as the Mass Media Bureau recently recognized.³ Indeed, the Guild had no right to be named a party, because none of the numerous allegations raised in its May 1, 1991 Petition to Deny GAF's renewal application were designated for hearing. In short, the Guild has no standing whatsoever to petition for the addition of issues in this proceeding.

2. The EEO Issue.

On the merits, the Guild's issue requests are equally deficient.⁴ The Guild first seeks an issue based on the fact that GAF voluntarily revised certain information concerning its EEO record listed in exhibits to its July 1, 1991 Consolidated Opposition to Petitions to Deny. Unfortunately, it is necessary to explain the real factual basis of the Guild's first issue

²8 FCC Rcd 1742 (ASD 1993).

³See Mass Media Bureau's Opposition to Petition For Intervention at 2. The Guild is also well aware that it is not a party, having petitioned to intervene in the hearing.

⁴GAF notes that the Mass Media Bureau opposes addition of either issue sought by the Guild.

request, because the Guild fails to do so.

On February 22, 1993, GAF filed an amendment to its Consolidated Opposition which voluntarily revised certain information in three exhibits, listing EEO data for the seven year license term, and the corresponding references to those figures in the text. Specifically, GAF revised the figures for Top 4 minority employment in 1989 and 1990, the figures for Top 4 minority hires in 1989 and total Top 4 minority hires, and the job classification of one minority hire. All of these revisions were made to change the job classification of one employee. GAF's amendment fully explained that WNCN's new General Manager had recently reviewed the station's EEO program and concluded, in his best judgment, that this one employee should not be classified as a Top 4 employee in the two years at issue.

The Guild now seeks an issue concerning the facts and circumstances under which GAF supposedly "falsely reported employment data," because that matter was not addressed in the HDO. Of course, the HDO did not address any allegations concerning GAF's EEO record because those allegations had been referred to the Mass Media Bureau's EEO Branch, where they remain pending. Thus, the HDO expressly stated that any grant of GAF's renewal application will be conditioned on resolution of the allegations made concerning the WNCN EEO record. 8 FCC Rcd at n.1. The Guild claims that an EEO issue may nevertheless be added here, because GAF's EEO amendment was filed too soon before adoption of the HDO to have been specifically considered.

The simple fact is that the Mass Media Bureau intended for the EEO Branch to resolve all allegations against the WNCN renewal stemming from the station's EEO record and filings -- as that Branch normally does. The Bureau also intended for the comparative hearing to commence before that review was completed. Clearly, the Bureau believed that the hearing should not be further delayed, more than two years after GAF filed its renewal application, by the backlog at the EEO Branch. It made this decision without considering the merits of any allegations concerning GAF's EEO record. Thus, the Guild has not shown, and there is absolutely no reason to believe, that the Bureau would have followed any other course in this case.⁵

Under well-established precedent, the Presiding Officer does not have authority to reconsider a determination made in the HDO. Atlantic Broadcasting Co., 5 FCC 2d 717, 8 RR 2d 991, 995-96 (1966); Western Cities Broadcasting, Inc., 6 FCC Rcd 2325 (Rev. Bd 1991). To the extent that the Guild may even petition for reconsideration of the HDO on allegations that have yet to be resolved, the FCC rules provide that such petitions are to be directed to the authority that issued the order. 47 C.F.R. Section 1.106. Indeed, the Guild has already filed such a

⁵Moreover, contrary to the Guild's inferences, GAF's amendment was hand-served on the Mass Media Bureau when it was filed, some three weeks before release of the HDO. Had that amendment negated the procedure chosen by the Bureau, as the Guild claims, the Bureau would likely have withheld release of the HDO or ordered immediate reconsideration on its own motion. Instead, the Bureau has opposed the Guild's request for reconsideration.

petition, which has been referred to the full Commission, and cannot be permitted to seek reconsideration of the HDO from both the Commission and, in effect, the Presiding Judge.

Moreover, it would make no sense whatsoever for two separate authorities within the Commission, the EEO Branch and Presiding Judge, to simultaneously consider the same allegations made against the WNCN EEO record and related filings. The Guild has shown no reason to depart from the Commission's standard procedure, pursuant to which the EEO Branch will continue its normal processing of the WNCN EEO record at renewal and consider related allegations. Of course, if the EEO Branch should determine that a hearing is warranted on those allegations, it will designate one. The duplication proposed by the Guild would waste the time and resources of the Commission as well as the applicants which are true parties to this case.

Furthermore, the Guild has failed to present specific allegations of fact sufficient to warrant a hearing based only upon GAF's voluntary revision of certain data listed in its Consolidated Opposition. Thus, the Guild utterly fails to meet the threshold requirements of Section 1.229(d). Although the Guild purports to incorporate by reference certain unspecified "evidence" in its separate petitions for reconsideration and intervention, none of these pleadings relied upon anything more than the Guild's own unsupported speculation and innuendo.⁶ As

⁶To the extent that the Guild's other petitions are incorporated herein by reference, GAF requests that its oppositions thereto and those of the Mass Media Bureau be considered as well.

the Mass Media Bureau has noted, the Guild provides no evidence that GAF intended to deceive the Commission. Moreover, its speculation is totally undermined by the fact that GAF voluntarily reclassified the affected employee. The Guild cannot explain why GAF might submit incorrect information, then correct it. The HDO did not even address WNCN's EEO record, although in any event its release was not a matter within the control of GAF. The EEO Branch will obviously consider GAF's amended showing, so that the WNCN EEO record will be evaluated on the basis of the employee at issue being classified in one of the bottom-nine categories. Even if originally erroneous, the misclassification of one employee does not constitute the filing of "false reports" or "false claims" as the Guild has asserted.

The bare existence of an error in a pleading, without any indication that the licensee meant to deceive the Commission, does not elevate a mistake to the level of intentional misrepresentation. Valley Broadcasting Company, 3 FCC Rcd 4947 at ¶ 298 (Initial Decision, ALJ Stirmer, 1988), aff'd, 66 RR 2d 600 (Rev. Bd 1989), rev. denied, 5 FCC Rcd 499 (1990). The burden is on the petitioner to make a prima facie demonstration of deception and of a desire, motive or logical reason to mislead in order to have an issue added. The Commission will not infer deceptions or improper motives from errors in filings accompanied by speculation and surmise, lacking factual support. Garrett, Andrews and Letizia, Inc., 86 FCC 2d 1172, 1180, 49 RR 2d 1001, 1007 (Rev. Bd 1981), review denied, 50 RR 2d 802 (1981). In this

case, the Guild has completely failed to meet its burden. As the Bureau correctly recognized, the Guild seeks nothing more than an unwarranted fishing expedition.

3. The Abuse Of Process Issue.

The Guild also seeks a hearing issue concerning whether GAF abused the FCC processes by allegedly making unspecified "threats and/or inducements" which were supposedly intended to avert the filing of unidentified "information and/or arguments" at the Commission. The Guild made this argument in its May 1, 1991 Petition to Deny, and it was properly rejected in the HDO. Thus, the Presiding Judge is without authority to revisit the matter. Atlantic Broadcasting, supra. Although the Guild asserts that the HDO did not satisfactorily address its allegation, that argument is properly made in a petition for reconsideration. As the Mass Media Bureau has noted, however, the HDO did fully address this allegation. See Mass Media Bureau's Opposition to Motion To Enlarge Issues at 4.

The Guild also fails to justify its second issue request with allegations of fact sufficient to warrant a hearing issue. As demonstrated in GAF's Opposition to Petition for Reconsideration, the Guild's allegations were cryptic and unsupported, and remain so. Issues may not be added based upon mere assertions of unspecified threats and inducements.

have been expected to do so.⁷

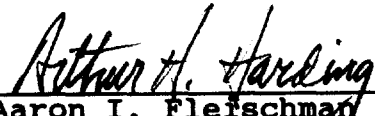
4. Conclusion.

Accordingly, even if the Guild had standing to request hearing issues when it is not a party, and even if the issues it requested were not precluded by the HDO, the Guild has utterly failed to support its issue requests with specific allegations of fact sufficient to warrant a hearing. Its Motion To Enlarge must be denied.

WHEREFORE, in light of the foregoing, it is respectfully requested that the Motion To Enlarge Issues filed by the Listeners' Guild, Inc. be DENIED.

Respectfully submitted,

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Date: May 4, 1993
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⁷In any event, the Guild has hardly been hindered from attacking WNCN at the Commission. On May 1, 1991, the Guild filed a petition to deny WNCN's renewal application which incorporated by reference no fewer than ten of its earlier pleadings. Subsequently, the Guild has petitioned for reconsideration of the HDO, for the right to intervene against GAF, and for the addition of hearing issues. It has also appealed the denial of earlier petitions to the U.S. Court of Appeals.

CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 4th day of May, 1993 placed a copy of the foregoing "Opposition To Motion To Enlarge Issues" in U.S. First Class Mail, addressed to the following:

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